80-532

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. _____

FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, and A. J. TAYLOR, its Secretary,

Petitioners,

v.

THE FLORIDA NURSING HOME ASSOCIATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether by agreeing to abide by federal laws and regulations applicable to the Medicaid program, Florida waived its Eleventh Amendment immunity from suit in federal court for retroactive damages sought by Medicaid providers because Florida complied with a federal regulation later declared in violation of federal statute.

PARTIES TO THE PROCEEDING

Petitioners are the State of Florida Department of Health and Rehabilitative Services and its Secretary, A. J. Taylor, substituted for William Page, Jr.

Respondents are the Florida Nursing Home Association, individual nursing homes located in the Southern District of Florida,[1] and Patricia Roberts Harris, as Secretary of the U.S. Department of Health and Human Services, formerly the Department of Health, Education and Welfare (HEW).

OPINIONS BELOW

The Opinion of the Fifth Circuit Court of Appeals is reported at 616 F.2d 1355 (5th Cir. 1980), and its text is reproduced in Appendix I. The Order denying Petition for Rehearing is reproduced in Appendix II.

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[1] For a listing of these individual facilities, see Petition for Certiorari in A. J. Taylor v. Golden Isles Convalescent Center, Inc., Case No. 80-85, now pending in this Court, at pp. i-ii.

The Fifth Circuit Opinion dealt with consolidated cases. The Golden Isles case concerned jurisdiction and venue in suits against states and is the subject of Petition for Certiorari in Case No. 80-85. This proceeding seeks review of the Florida Nursing Home Association case concerning Eleventh Amendment immunity.

The opinion below reversed the Order of the U.S. District Court for the Southern District of Florida granting summary judgment in favor of the State on the claim by the nursing home plaintiffs for retroactive benefits. The District Court held such claim was barred in federal court by the Eleventh Amendment. The District Court's Memorandum Opinion and Order is reproduced in Appendix III.

JURISDICTION

The Opinion the Fifth Circuit Court of Appeals sought to be reviewed was entered on May 6, 1980. Timely petition for rehearing was denied on July 22, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XI:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the states by citizens of another state or by citizens or subjects of any foreign state.

42 U.S.C. sec. 1396a(a)(13)(E); Sec. 249, P.L. 92-603:

Sec. 1396a. State plans for medical assistance--Contents

(a) A State plan for medical assisance must--

(13) provide--

(E) effective July 1, 1976, for payment of the skilled nursing facility and intermediate care facility services provided under the plan on a reasonable cost related basis, as determined in accordance with methods and standards which shall be developed by the State on the basis of cost-finding methods approved and verified by the Secretary.

45 C.F.R. sec. 250.30(a)(3)(iv)(1976):

The State plan shall set forth the methods and standards used by the State to determine reasonable cost-related payment rates, and shall set payment rates on the basis of such methods and standards, to be effective no later than January 1, 1978.

Article X, Section 13, Florida Constitution:

Suits against the state.--

Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.

Section 409.055, Florida Statutes (1977):

The department...shall have the power to contract and be contracted with, to sue and be sued in actions ex contractu but not in torts, * * *

STATEMENT OF THE CASE

This case originated in the United States District Court for the Southern District of Florida under federal question jurisdiction, 28 U.S.C. sec. 1331. Florida nursing homes challenged the validity of a federal regulation concerning the time requirement for states participating in the Medicaid program to implement a reasonable cost-related plan for reimbursement of providers of nursing home services to welfare recipients.

Public Law 92-603, sec. 249, 42 U.S.C. sec. 1396a(a)(13)(E), effective July 1, 1976, requires participating states to reimburse nursing home pro-

viders on a "reasonably cost-related" basis. However, the Department of Health, Education and Welfare, by regulation codified as 45 C.F.R. sec. 250.30(A)(3)(iv)(1976), set January 1, 1978 as the effective date of the statute because HEW had been slow in promulgating regulations and did not wish to penalize the states because of its delay.[2]

On October 18, 1977, the District Court found the HEW regulation inconsistent with congressional mandate and ordered Florida to submit a new plan to HEW for approval and to reimburse under such approved (new) plan prospectively from the date of adjudication of invalidity.

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[2] See Memorandum Opinion of District Court for Southern District of Florida, dated October 1, 1977, reported at 442 F.Supp. 201 (S.D. Fla. 1977) and reproduced at Appendix IV.

On July 7, 1978 the District Court denied the motions of the nursing homes to require Florida to implement its new plan back to July 1, 1976. The District Court held this was a claim for retroactive damages for which federal court jurisdiction was barred by the Eleventh Amendment and this Court's ruling in Edelman v. Jordan, 415 U.S. 651 (1974). The District Court entered summary judgment in favor of the State and dismissed all claims by the nursing homes for retroactive benefits.

The Fifth Circuit Court of Appeals reversed this judgment in favor of the State. The Fifth Circuit agreed that the nursing homes were seeking payment of state funds as a result of a past breach of legal duty, which was a claim for retroactive damages barred by the Eleventh Amendment unless consented to

by the State. However, the Fifth Circuit held that Florida had waived its constitutional immunity against being sued on this claim in federal court because as part of the standard provider agreement, Florida and Medicaid providers mutually agreed to abide by all state and federal laws, regulations and guidelines.[3]

On September 16, 1978, after HEW had approved a new cost-related plan, the District Court ordered that payment be made under the new plan from October 1, 1977, reserving for trial the

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[3] The language appears in the sixth typewritten paragraph of a form agreement, containing two legal-sized pages in single space print. The paragraph reads verbatim:

> "Both the provider and the single state agency hereby agree to recognize and abide by all state and federal laws, regulations, and guidelines applicable to participation in and administration of, the Title XIX Medicaid Program."

question of whether the new plan met the statutory criteria of reasonably cost-related. (Appendix V)

Recently, on July 29, 1980, the District Court remanded the new plan back to HEW for reconsideration because HEW's previous review was deemed insufficient under criteria recently announced by the Fifth Circuit in Alabama Nursing Home Ass'n. v. Harris, 617 F.2d 388 (5th Cir. 1980). (Appendix VI)

REASONS FOR ALLOWANCE OF THE WRIT

The opinion below effectively nullifies this Court's landmark decision of Edelman v. Jordan, 415 U.S. 651, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974).

This Court held in Edelman "that retroactive welfare benefits awarded by a Federal District Court to plaintiffs,

by reason of wrongful denial of benefits by state officials prior to entry of the court's order determining the wrongfulness of their actions, violated the Eleventh Amendment." Quern v. Jordan, 440 U.S. 332, 333-34, 59 L.Ed.2d 358, 362, 99 S.Ct. 1139 (1979).

Edelman specifically recognized: 1) that Eleventh Amendment immunity extended to past violations of federal law related to a cooperative federal-state program under the Social Security Act comparable to the Medicaid program; 2) that a state's agreement to administer such program in compliance with federal law did not constitute consent for it to be sued for retroactive damages in federal court; and 3) that a state's consent to waive its Eleventh Amendment immunity must be clear and express:

"The Court of Appeals held that as a matter of federal law Illinois had 'constructively consented' to this suit by participating in the federal AABD program and agreeing to administer federal and state funds in compliance with federal law. Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' Murray v. Wilson Distilling Co., 213 U.S. 151, 171, 53 L.Ed. 742, 29 S.Ct. 458 (1909). We see no reason to retreat from the Court's statement in Great Northern Insurance Co. v. Read, 322 U.S., at 54, 88 L.Ed. 1121 (footnote omitted):

> '[W]hen we are dealing with the sovereign

> exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.'

The mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts.* * * The only language in the Social Security Act which purported to provide a federal sanction against a State which did not comply with federal requirements for the distribution of federal monies was found in former 42 U.S.C. sec. 1384 [42 U.S.C.S. sec. 1384](now replaced by substantially similar provisions in 42 U.S.C. sec.804), which provided for termination of future allocations of federal funds when a participating State failed to conform with federal law. This provision by its terms did not authorize suit against anyone, and standing alone,

> fell far short of a waiver by a participating State of its Eleventh Amendment immunity." Id., 415 U.S. at 673-74; 39 L.Ed.2d 678-79. [e.s.]

Contrary to Edelman, the opinion below holds that a state may be sued in federal court for retroactive damages growing out of its participation in a welfare program because the administering state agency agreed to abide by federal law. In effect, the opinion below approves concepts of constructive consent and implied waiver which this Court explicitly rejected in Edelman.

A state may not waive its Eleventh Amendment immunity by inference, and the State of Florida does not expressly consent to be sued in Federal Court because a state agency which can be sued in state court agrees to abide by federal law.

This Court has consistently held that a state statute consenting to suit against the state constitutes consent to be sued in state court,[4] not federal court. A statute waiving a state's common law immunity against suit in its own courts is immaterial to consideration of whether the state waives its immunity from suit in federal court under the Eleventh Amendment.[5]

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[4] See authorities discussed in Anno., 50 L.Ed.2d 928, sec. 15 at pp. 954-56. Also see Medicenters of America, Inc. v. Virginia, 373 F.Supp. 305 (E.D. Va. 1974), and Pharmacists Soc. of Milwaukee Cty. v. Dept. of Human Services, 79 FRD 405, 408-410 (E.D. Wisc. 1978), applying these authorities to bar federal court damage suits related to the medicaid program.

[5] See Nevada vs. Hall, 440 U.S. 410, 59 L.Ed.2d 416, 99 S.Ct. 1182, 1186-88 (1979), holding that a state's sovereign immunity from suit in its own courts does not provide a basis for a claim of immunity in another sovereign's court. The basis for a state's immunity from suit in federal court is the Eleventh Amendment to the U.S. Constitution, and a state must waive the immunity given under that Amendment to be sued in federal court.

Indeed, Edelman v. Jordan, supra, addresses this very point in footnote 19, 415 U.S. at 678, stating that whether Illinois had abolished its common law sovereign immunity in its state courts was not determinative of whether it had relinquished its Eleventh Amendment immunity in the federal courts.

Moreover, the State of Florida has not waived its Eleventh Amendment immunity by statute as required under Florida law. The state agency's agreement is immaterial to consideration of whether Florida has consented to suit in federal court since no overriding federal law or policy pertaining to the medicaid program mandates such consent by agreement. Under decisions of this Court, where no overriding federal law or policy exists, state law determines

whether the state has consented to suit in federal court.[6]

Florida's Constitution (Art. X, sec. 13) requires that consent to suit against the state as to any liability be given by general law. By virtue of this provision, no part of the state's immunity may be waived except by general law (statute) that is clear and unequivocal, and waiver may not occur by special act.[7] In Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459, 89 L.Ed. 389, 65 S.Ct. 347 (1945), this

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6 Palmer v. Ohio, 248 U.S. 32, 63 L.Ed. 108, 39 S.Ct. 16 (1918); Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459, 89 L.Ed. 389, 65 S.Ct. 347 (1945).

6 Hampton v. State Bd. of Educ., 105 So. 323 (1925); Spangler v. Florida State Turnpike Auth., 106 So.2d 421 (Fla. 1958); Arnold v. Shumpert, 217 So.2d 116, 119-20 (Fla. 1968); Manatee County v. Town of Long Boat Key, 365 So.2d 143, 147 (Fla. 1978).

Court examined a similar provision of the Indiana Constitution and held that Indiana required statutory waiver of its Eleventh Amendment immunity and that its executive branch was not authorized to consent to suit in federal court in particular cases:

> "We interpret this provision as indicating a policy prohibiting state consent to suit in one particular case in the absence of a general consent to suit in all similar causes of action. Since the state legislature may waive state immunity only by general law, it is not to be presumed in the absence of clear language to the contrary, that they conferred on administrative or executive officers discretionary power to grant or withhold consent in individual cases." 323 U.S. at 468.

No statute in Florida consents to suit against the state in federal court, and the state agency may not

contract away the state's Eleventh Amendment immunity, even if it had attempted to do so in this case.[8] Eleventh Amendment immunity may not be waived by the state agency for a particular class of persons in a particular kind of case. Either Florida has waived its Eleventh Amendment immunity by appropriate statute, or it has not.

Finally, even if the state agency could waive the state's immunity as to particular cases, its agreement to abide by federal law is not consent to suit against the state in federal court and

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[8] Whether the state agency could waive Eleventh Amendment immunity under Florida law by instituting suit in federal court or by failing to raise its immunity as a defense is not germane to the issues in this case.

is not a clear waiver of Eleventh Amendment immunity, for the following reasons:

1. The Eleventh Amendment is part of federal law. A constitutional right cannot be waived by agreeing to abide by federal law which confers that right. Constitutional rights are not foregone by an affirmation of their existence. If this be the law, then medicaid providers, who also agree to abide by federal law, thereby waive their constitutional right against self-incrimination regarding their participation in the program. And welfare recipients whose application acknowledges compliance with federal law thereby waive their constitutional right to due process. And so on.

2. Agreement to be bound by federal law is not the equivalent of consent to a damage suit in federal court for breach of federal law duty. State judges are required by Article VI of the United States Constitution to follow federal law. This Court presumes state courts will properly adjudicate claims arising under federal law[9] or involving questions of federal law.[10]

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[9] Hoffman v. Pursue, Ltd., 420 U.S. 592, 611, 43 L.Ed.2d 482, 496, 95 S.Ct. 1200 (1975); Dowd Box Co. v. Courtney, 368 U.S. 502, 508, 7 L.Ed.2d 483, 487, 82 S.Ct. 519 (1962).

[10] Pan American P. Corp. v. Superior Court, 366 U.S. 656, 663-64, 6 L.Ed.2d 584, 589-90, 81 S.Ct. 1303 (1961).

3. The state agency's agreement to abide by federal law is an acknowledgment of the obligation already imposed by operation of law. States electing to participate in the Medicaid program must comply with the requirements of Title XIX of the Social Security Act,[11] and their plans must conform with the requirements of federal law and regulations.[12] States are also required to enter provider agreements

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[11] Harris v. McRae, ___U.S.___, 65 L.Ed.2d 784, 794, 799 (1980).

[12] See King v. Smith, 392 U.S. 309, 317, 20 L.Ed.2d 1118, 1125, 88 S.Ct. 2128, note 12. Unless HEW (HHS) approves the plan, federal funds will not be made available 42 U.S.C. 1396; and if the state fails to comply with the plan, HHS may terminate federal payments. 42 U.S.C. sec. 1396(c). These provisions are comparable to those in the AFDC and AABD programs discussed in King v. Smith and Edelman v. Jordan, supra.

that set out the relationship and responsibilities of the parties.[13] Since the state's agreement to abide by federal law as part of the plan does not consent to suit in federal court (Edelman, supra), a state agency's recognition of that obligation in a provider agreement required to carry out the plan has no greater consequence. All applicable federal requirements necessarily are part of the provider agreement.[14]

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[13] See 45 CFR sec. 205.100(a)(2)(ii) (1977).

[14] See Farmers and Merchants Bank vs. Federal Reserve Bank, 262 U.S. 649, 67 L.Ed. 1145, 1164 (per Justice Brandeis): "Laws which existed at the time and place of the making of a contract...form a part of it, as fully as if they had been expressly referred to or incurred in its terms."

The practical effect of the opinion below is that any time a state agency expresses its intent to abide by federal law, the State waives its Eleventh Amendment immunity. Since the State must comply with federal law as a condition to participation in the Medicaid program, this expression is inevitable and might occur in a state regulation, in correspondence, or in a handbook about the program. It is no longer necessary for a state statute to waive Eleventh Amendment immunity, and the requirements of state law regarding waiver of immunity may be completely ignored.

If the Eleventh Amendment is properly respected, respondent nursing homes can seek recourse against Florida by suit in state court, and they now have an action pending in state court to recover the same retroactive benefits being sought in this case.[15] Under Florida law, equitable principles will control whether retroactive benefits are awarded for the period prior to court-ordered clarification of the state's duty under federal law.[16]

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15 Florida Health Care Ass'n v. Page, Case No. 79-2564, Circuit Court for Leon County, Florida.

16 See Gulesiar v. Dade County School Board, 281 So.2d 325 (Fla. 1973).

Congress has recognized the propriety of requiring Medicaid providers to seek recourse elsewhere than federal court. On the same day as it was to go into effect, Congress repealed a statute requiring states in the medicaid program to waive their federal court immunity as to hospital provider suits.[17] Hospital Ass'n. of New York, Inc. v. Toia, 577 F.2d 790, 796 (2d Cir. 1978) explains that repeal of this mandatory waiver eliminated the ability of hospital providers to seek redress in federal court. But it was emphasized that this was only one form of remedy and that hospital providers still had recourse to state courts and HEW administrative proceedings.

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[17] See P.L. 94-182, sec. 111 and P.L. 94-552. Apparently, the mandatory waiver was passed initially in response to Edelman v. Jordan, supra.

There are literally thousands of federal statutes, regulations and guidelines which states administering the various welfare programs can violate in good faith. The opinion below could have an immense budgetary impact on the states if federal courts are insensitive to their fiscal problems.

The nursing home industry is attacking the validity of current reimbursement plans around the country because federal executives failed to properly implement federal statutes. Millions and millions of dollars are potentially involved, even if the attacks are restricted to the issues raised in this case.

For states which followed the January 1978 federal time regulation, there is the potential cost of imple-

menting current plans back to July 1, 1976. And for states whose current plans will have to be re-reviewed because HEW review standards were insufficient under Alabama Nursing Home Ass'n v. Harris, 617 F.2d 388 (5th Cir. 1980), there is the potential cost of implementing revised plans developed under current standards back to July 1, 1976.

Finally, the opinion below results in an anomalous distinction between persons to whom the State owes a duty to comply with federal law. Welfare recipients in Florida cannot sue the State for retroactive benefits in

federal court, but service providers are allowed access to federal court for that purpose.

The respondent nursing homes in related Case No. 80-85 triumph this as the important issue in the case. They indicate by letter to the Court dated August 15, 1980, that this Petition would address "...the extremely important and crucial issue of retroactive Eleventh Amendment immunity as regards private business service providers."

Florida submits that health care providers have no special exemption

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[18] See Owen v. Roberts, Case No. 73-423-Civ-J-S (M.D. Fla. 1974)(3-judge panel), applying Edelman v. Jordan, supra, to deny retroactive benefits in a suit by welfare recipients against Petitioner to declare certain state eligibility regulations in conflict with federal law.

from the Eleventh Amendment. Whether recipients or providers are involved, Florida is entitled to have its own courts decide whether damages should be awarded against it for breach of legal duty not clarified by court order.[19]

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[19] The opinion below cites New York State Ass'n for Retarded Children v. Kerry, 596 F.2d 27, 39 (2d Cir. 1979), as indicating basis for federal jurisdiction. That case dealt with prospective damages awarded to enforce compliance with a federal court order which the state failed to follow. Retroactive damages were not involved.

CONCLUSION

The opinion below clearly departs from controlling precedent of this Court and creates serious potential consequences for states participating in the Medicaid program. Summary disposition should be made on the merits to reinstate the judgment of the District Court. See Supreme Court Rule 23.1 and Alabama v. Pugh, 483 U.S. 783, 98 S.Ct. 3057, 57 L.Ed.2d 1115 (1978).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of October , 1980, three copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed, postage prepaid, to ELLIOTT SHAW, ESQUIRE, Suite 611, New World Tower, 100 N. Biscayne Blvd., Miami, FL 33132; A. THOMAS MIHOK, ESQUIRE, 5458 Woodcrest Drive, North, Orlando, FL 32807; and THE SOLICITOR GENERAL, Department of Justice, Washington, D.C. 20530.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

CASE NO. _____

FLORIDA DEPARTMENT OF HEALTH
and REHABILITATIVE SERVICES, et al.,

Petitioners,

v.

THE FLORIDA NURSING HOME ASSOCIATION, et al.,

Respondents.

APPENDIX

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APPENDIX NO.	ITEM DESCRIPTION
I	Decision of Fifth Circuit Court of Appeals dated May 6, 1980.
II	Order of Fifth Circuit Court of Appeals Denying Rehearing, dated July 22, 1980.
III	Order of District Court for Southern District of Florida dated July 7, 1978 (granting judgment in favor of the State on all questions regarding Plaintiff's entitlement to retroactive benefits).
IV	Memorandum Opinion and Order of District Court for Southern District of Florida dated October 18, 1977.
V	Order of District Court of Southern District of Florida dated September 16, 1978.
VI	Order of District Court for Southern District of Florida dated July 28, 1980.

APPENDIX I

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 78-2745, 77-3467

FLORIDA NURSING HOME ASSOCIATION, et al.,
Plaintiff-Appellants,

v.

WILLIAM PAGE, JR., et al.,
Defendants-Appellees.

GOLDEN ISLES CONVALESCENT CENTER, INC., et al.,
Plaintiffs-Appellants,

v.

PATRICIA ROBERTS HARRIS, etc., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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May 6, 1980

Before AINSWORTH and HENDERSON, Circuit Judges, HUNTER, District Judge.

AINSWORTH, Circuit Judge:

These consolidated appeals arise from separate orders of the United States District Court for the Southern District of Florida. The orders resulted from partial adjudications in two suits brought by several Florida nursing homes against the Florida Department of Health and Rehabilitative Services (DHRS) and its secretary and the secretary and regional director of Health, Education and Welfare (HEW) concerning plaintiffs' rights to receive payments on a "reasonable cost-related basis" for services rendered under the Medicaid program of the Social Security Act (the Act). 42 U.S.C. § 1396 et seq.

Both suits sought to have a regulation issued by HEW, 45 C.F.R. § 250.3(a)(3)(iv) (1976), declared invalid. This regulation establishes January 1, 1978 as the date by

which states participating in the Medicaid program were required to implement a plan to reimburse providers of services on a reasonable cost-related basis. Section 249 of the Social Security Act, 42 U.S.C. § 1396a(a)(13)(E), however, fixes July 1, 1976 as the effective date for implementing such a plan for reimbursement.

In the first suit, brought by Golden Isles Convalescent Center, Inc. and other licensed nursing homes in Dade and Broward Counties, Florida (referred to collectively as Golden Isles), the district court upon plaintiffs' motion for summary judgment held the administrative regulation invalid as inconsistent with the congressional mandate provided for in the Act. In partially granting Golden Isles' motion for summary judgment, the court held that plaintiffs were entitled to payment from the state on

a reasonable cost-related basis prospectively from the date of its ruling, October 18, 1977. It also ordered Florida DHRS to submit a plan effective October 18 and approved by HEW in compliance with the Act's mandate for providing a cost-related reimbursement plan. The court reserved ruling on the question of plaintiffs' entitlement to reimbursement retroactively from July 1, 1976, the date set out in the statute. In its order the court also ruled that its exercise of jurisdiction and venue were proper, despite objections by defendants that exclusive jurisdiction lies in the United States Supreme Court and that venue was proper only in the Northern District of Florida, the location of the main offices of the DHRS. Defendant Florida DHRS appealed the court's order. The issues raised by appellant constitute the substance of the first appeal before us,

which appeal will be referred to as the Golden Isles case (No. 77-3467).

In the second suit, the court also granted a partial summary judgment in favor of plaintiffs, Florida Nursing Home Association and its nursing home members (collectively referred to as Florida Nursing Home). In its order the court incorporated its opinion in the Golden Isles case invalidating the HEW regulation and requiring the state to reimburse plaintiffs on a reasonable cost-related basis from October 18, 1977 prospectively. Once again, a ruling on plaintiffs' right to retroactive relief was reserved by the district court until it considered written memoranda submitted by the parties. No appeal was taken by defendants from this order.

While Florida's appeal from the partial summary judgment in the Golden Isles case

was still pending in this court, the district court consolidated for trial the Golden Isles and Florida Nursing Home cases for a determination whether the current approved plan submitted by Florida DHRS complies with the applicable Social Security statute. In its order the court also entered judgment in favor of defendant Florida DHRS denying plaintiffs Golden Isles and Florida Nursing Home retroactive reimbursement from the state on a reasonable cost-related basis for services rendered prior to October 18, 1977. Plaintiffs appealed the court's ruling regarding their right to retroactive payments. The issue of plaintiffs-appellants' entitlement to reimbursement from the state on a reasonable cost-related basis prior to October 18, 1977 constitutes the substance of the second appeal to be addressed by us, which we will

refer to as the Florida Nursing Home case (No. 78-2745).

Golden Isles Case (No. 77-3467)

In its appeal of the court's partial granting of Golden Isles' motion for summary judgment, appellant Florida DHRS asserts the district court erred in four respects. We disagree and affirm the court's ruling.

I.

[1] Appellant first contends that the district court was without jurisdiction to hear this controversy because original and exclusive jurisdiction lies in the United States Supreme Court. Florida argues that since this action constitutes a controversy between a state and its own citizens under article III, section 2, clause 2 of the United States Constitution, the Supreme Court has original and exclusive jurisdiction.

Appellant's contention is erroneous.

It is well established that the United States Constitution grants neither original nor exclusive jurisdiction to the United States Supreme Court over controversies between a state and its own citizens. C. Wright, Law of Federal Courts 557 (3d ed. 1976). The first paragraph of section 2 of article III of the constitution provides in pertinent part:

> The judicial Power shall extend . . . to Controversies to which the United States shall be a Party;—to controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States . . ..

The second clause, which appellant relies on here, states:

> In all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned the supreme Court shall have appellate jurisdiction . . ..

In interpreting these provisions, the

Supreme Court several years ago in California v. Southern Pacific Co., 157 U.S. 229, 258, 15 S.Ct. 591, 602, 39 L.Ed. 683 (1895), made it clear that the language of clause 2 "[i]n all Cases . . . in which a State shall be [a] Party," means in all the cases enumerated in clause 1 of article III, section 2. Nowhere in clause 1 is there mention of a controversy between a state and its own citizens. As the Supreme Court firmly stated: "By the Constitution . . . this court has exclusive jurisdiction of all controversies of a civil nature where a state is a party, but not of controversies between a state and its own citizens . . .." Id. at 258, 15 S.Ct. at 602. See Texas v. Interstate Commerce Commission, 258 U.S. 158, 163, 42 S.Ct. 261, 263, 66 L.Ed. 531 (1922); Minnesota v. Northern Securities Co., 184 U.S. 199, 245-46, 22 S.Ct. 308, 325-26,

46 L.Ed. 499 (1902).

This rule has been codified in the statutory provision which describes the original jurisdiction of the Supreme Court. See 28 U.S.C. § 1251. Although section 1251(b)(3) provides for the Supreme Court's original, but not exclusive, jurisdiction of all actions by a state against the citizens of another state, there is no provision for controversies between a state and its own citizens.

Golden Isles brought this suit alleging violations by Florida of 42 U.S.C. § 1396a. The district court's ruling that it had jurisdiction over this action pursuant to 28 U.S.C. § 1331(a), which provides for the district court's jurisdiction of all actions arising under the laws of the United States wherein the amount in controversy exceeds $10,000, was thus proper.

II.

Appellant Florida DHRS next contends that venue was proper only in the Northern District of Florida where the principal offices of DHRS and its secretary are located. It asserts that when a state officer or agency is sued for the purpose of compelling official action, venue lies only in the district wherein the agency and its executive officers maintain their official residences. Our review of the statute and the important considerations underlying the choice of a proper forum lead us to conclude that appellant's assertion that venue is improper in the Southern District of Florida is erroneous..

Venue is governed by the federal venue statute, 28 U.S.C. § 1391(b), which provides:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants

reside, or in which the claim arose, except as otherwise provided by law.

The general rule in suits against public officials is that a defendant's residence for venue purpose is the district wherein he performs his official duties. 1 Moore's Federal Practice ¶0.142[5.-1-2], at 1396 (2d ed. 1979). See, e. g., Butterworth v. Hill, 114 U.S. 128, 132, 5 S.Ct. 796, 798, 29 L.Ed. 119 (1885); O'Neill v. Battisti, 472 F.2d 789, 791 (6th Cir. 1972), cert. denied sub nom. Heitzler v. O'Neill, 411 U.S. 964, 98 S.Ct. 2142, 36 L.Ed.2d 685 (1973). A number of the cases applying this principle have involved federal officials or agencies and have found only one official residence. See, e.g., Ernst v. Secretary of the Interior, 244 F.2d 344, 17 Alaska 133 (9th Cir. 1957); Trueman Fertilizer Co. v. Larson, 196 F.2d 910 (5th Cir. 1952); Hartke v. Federal Aviation Administration, 369 F.Supp. 471 (E.D.N.Y.1973).

It has been held, however, that a state agency or official does not necessarily have a single residence. See Buffalo Teachers Federation, Inc. v. Helsby, 426 F.Supp. 828 (S.D.N.Y.1976). In Buffalo Teachers Federation the court noted that in suits against federal agencies, the federal government would be faced with serious difficulties if it were forced to answer complaints in a multitude of forums and forum shopping would be greatly encouraged if suits could be brought in any district where a subordinate departmental officer resides. Such problems, however, "are significantly less serious in the context of a suit against a state governmental entity or official." Id. at 829. In the state context, there is little threat of inconvenience or even forum shopping, at least sufficient "to warrant a blanket rule that there may never be more than a single residence." Id. In Buffalo Teachers

Federation the court determined that although the state agency involved had its central headquarters in the Northern District of New York, venue was not lacking in the Southern District where the suit was brought. The agency involved maintained a field office in the Southern District and a significant portion of its business was conducted from that office.

Here, Florida DHRS, though headquartered in the Northern District of Florida, maintains a large office in the Southern District and much of its business is transacted from that office. Furthermore, the venue statute makes it clear that the residence of defendants does not provide the only basis for venue. Venue is also proper in the district where the claim arose. Though the legislative history of section 1391(b) fails to suggest what the draftsmen thought about the question of where

a claim arises, 1 Moore's Federal Practice ¶0.142[5.-2], at 1423 (2d ed. 1979), when the statute was amended to extend venue to a district "in which the claim arose," the purpose was to "facilitate the disposition of . . . claims by providing a more convenient forum to the litigants and witnesses involved." H.R.Rep.No. 1393, 89th Cong., 2d Sess 2 (1966). Thus, "where the claim arose" should be "ascertained by advertence to events having operative significance in the case, and a common-sense appraisal of the implications of those events for accessibility to witnesses and records." Lamont v. Haig, 590 F.2d 1124, 1134 (D.C.Cir.1978). This is not to suggest that only a single district can satisfy the statutory standard with respect to any given claim. Often, the factors deemed determinative might well indicate the suitability of several forums. See, e.g., Commercial Lighting Products, Inc. v.

United States District Court, 537 F.2d 1078, 1080 (9th Cir. 1976); Tefal, S.A. v. Products International Co., 529 F.2d 495, 496-97 (3d Cir. 1976); Gardner Engineering Corp. v. Page Engineering Co., 484 F.2d 27, 32-33 (8th Cir. 1973). In any case, the court should not oppose the plaintiffs' choice of venue if the activities that transpired in the district where suit is brought were not insubstantial and the forum is a convenient one balancing the equities and fairness to each party. Lamont v. Haig, supra, 590 F.2d at 1134 n. 62; Weil v. New York State Department of Transportation, 400 F.Supp. 1364, 1365 (S.D.N.Y. 1975).

Applying this standard, then, it is clear that venue properly lies in this matter in the Southern District of Florida. Not only does appellant maintain a large office there but the payments which Golden Isles is

seeking were allegedly due it within the Southern District where Golden Isles and the other plaintiffs-appellees are located. This is sufficient in the circumstances of this case to justify the placing of venue in the Southern District of Florida.

III.

Appellant's third contention is that the Eleventh Amendment to the United States Constitution bars the district court's directive that the Florida agency submit a plan for reimbursing Golden Isles in accordance with the requirements of the Medicaid statute. Appellant argues that the court's order constitutes a prohibited ruling against the state itself, binding the state in contravention of the Eleventh Amendment to a particular course of conduct. Florida's argument is without merit.

The Supreme Court held in Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d

662 (1974), that a federal court decree mandating that a state officer or agency administering a federal entitlements program comply with the requirements of the federal act creating the program is not void by virtue of the Eleventh Amendment, even though the state official will necessarily be required to spend money from the state treasury to carry out the court's order. Id. at 667-68; 94 S.Ct. at 1357-58. See Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). This is a well-established principle and has been applied consistently by courts in cases involving matters similar to that confronting us here. See Rothstein v. Wyman, 467 F.2d 226, 236 (2d Cir. 1972), cert. denied. 411 U.S. 921, 93 S.Ct. 1552, 36 L.Ed.2d 315 (1973); Hempstead General Hospital v. Whalen, 474 F.Supp. 398, 406 (E.D.N.Y.1979); Alabama

Nursing Home Association v. Califano, 433 F.Supp. 1325, 1330-31 (M.D.Ala.1977); Pharmacists Society of Milwaukee County, Inc. v. Department of Health and Social Services, 79 F.R.D. 405, 408 (E.D.Wis.1978).

Here, the district court's order does no more than require Florida DHRS, prospectively from the date of its order, to comply with the Social Security Act's mandate that it reimburse providers of skilled nursing services on a reasonable cost-related basis. Judicial enforcement of the statute's requirements is therefore appropriate, see Rosado v. Wyman, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970), and the Eleventh Amendment is no bar where by its terms the court's decree is prospective in nature. Edelman, supra, 415 U.S. at 667-68, 94 S.Ct. at 1358.

IV.

Appellant's final contention is that the court improperly granted in part Golden Isles' motion for summary judgment since there exists a material issue of fact as to whether the state's current Medicaid plan meets the requirements of section 249 of the Social Security Act. Florida's contention misperceives the court's ruling.

In its order the district court did not rule that the current Florida Medicaid plan was not in conformity with the Act's requirement that the agency reimburse providers of services on a reasonable cost-related basis. Rather, the court's order merely directed HEW, in accordance with section 249, to determine whether the current Florida plan is in conformity with the statute. If HEW's determination was adverse to the state, Florida DHRS was directed to submit a conforming plan

to be approved by HEW. Once HEW approved the plan, the final determination whether the plan meets the requirements of section 249 was reserved for trial. Thus, the court's order was not dispositive of any factual dispute.

The district court did not err, therefore, in partially granting Golden Isles' motion for summary judgment as there were only issues of law presented and plaintiffs were entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c); Nunez v. Superior Oil Co., 572 F.2d 1119, 1123 (5th Cir. 1978).

Accordingly, this judgment is AFFIRMED.

Florida Nursing Home Case
(No. 78-2745)

In this consolidated case, appellants Florida Nursing Home and Golden Isles appeal from the court's order denying their claim

for reimbursement on a reasonable cost-related basis for nursing services provided by appellants prior to October 18, 1977, the date of the court's entry of a partial summary judgment in the Golden Isles litigation. This appeal presents one basic issue: whether the Eleventh Amendment to the United States Constitution operates as a bar to the retroactive relief sought by appellants. We find that under the circumstances of this case, Florida has waived its Eleventh Amendment immunity by consenting to be sued in federal court under the terms of its contracts with appellants.

Under the Eleventh Amendment an unconsenting state is immune from suits brought in federal court by her own citizens. Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed.2d 842 (1890); Parden v. Terminal Railway, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964).

It is well established that suits brought against an agency of the state are in fact suits against the state and covered by the Eleventh Amendment. Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 462, 65 S.Ct. 347, 350, 89 L.Ed. 389 (1945); Employees v. Department of Public Health and Welfare, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973). Defendant-appellee Florida Department of Health and Rehabilitative Services is an agency of the Florida state government created by the Legislature. See Fla.Stat.Ann. § 409.016 et seq. (West 1973 & Supp.1979). The relief sought by appellants is reimbursment from the state agency on a reasonable cost-related basis as required by section 249 of the Social Security Act for nursing services rendered from July 1, 1976, the effective date of the Act. As noted earlier, the

district court's order denied such relief for any services provided prior to October 18, 1977, the date of the court's ruling. The effect of an award granting Golden Isles and Florida Nursing Home their requested relief will require the payment of state funds as a result of a past breach of a legal duty on the part of the state. Since this relief is retroactive in nature, if not consented to by the state, plaintiffs' action in federal court is barred by the Eleventh Amendment. Edelman, supra, 415 U.S. at 668, 94 S.Ct. at 1358. Thus, the sole issue reduces itself to a determination whether the State of Florida has consented to this action and effected a waiver of its sovereign immunity under the Eleventh Amendment.

For the purposes of this suit, the Florida Department of Health and Rehabilitative Services

is governed by Fla.Stat.Ann. § 402.34 (West Supp.1979). This section provides in pertinent part:

> The department is a body corporate . . . . It shall have the power to contract and be contracted with, to sue and be sued in actions ex contractu but not in torts, and to have and to possess corporate powers for all purposes necessary to administer this chapter. . . .

By creating this department with authority to sue and be sued the State of Florida has expressly waived its sovereign immunity. This language, standing alone, however, does not constitute a waiver by the state of its constitutional immunity under the Eleventh Amendment from suit in federal court. See Smith v. Reeves, 178 U.S. 436, 441, 20 S.Ct. 919, 921, 44 L.Ed. 1140 (1900); Scott v. Board of Supervisors, 336 F.2d 557, 558 (5th Cir. 1964).

Nevertheless, the state has done more here than merely waive its general immunity

from suit in its own state courts. Pursuant to its corporate powers as outlined in section 402.34, Florida DHRS drafted and executed a contract with each appellant which outlines the precise obligations of the agency and the provider of services and which each provider signed as a prerequisite to its participation in the Medicaid program. The sixth paragraph of the agreement which Florida entered into with appellants states:

> Both the provider and the Single State Agency hereby agree to recognize and abide by all State and Federal Laws, Regulations, and Guidelines applicable to participation in and administration of, the Title XIX Medicaid Program.

By contracting with appellants to be bound by all federal laws applicable to the Medicaid program, the state has expressly waived its Eleventh Amendment immunity and consented to suit in federal court regarding any action by providers alleging a breach

of these laws.

While it is true that waiver of immunity under the Eleventh Amendment is not to be lightly inferred, Edelman, supra, 415 U.S. at 673, 94 S.Ct. at 1361, the "overwhelming implication," id. 94 S.Ct. at 1361, of the state's agreement with appellants is that it constitutes a waiver of Florida's constitutional immunity by requiring the DHRS to recognize and abide by all federal laws in participating in the Medicaid program. To bar federal court jurisdiction in this case could operate to immunize state officers and the agency from their contractual duty to adhere to federal statutory requirements. See generally New York. State Association for Retarded Children v. Carey. 596 F.2d 27, 39 (2d Cir. 1979). A contrary holding in the circumstances of this case, where appellants

Golden Isles and Florida Nursing Home have provided nursing services in accordance with their contractual and statutory obligations since July 1, 1976, would achieve an inequitable result. Accordingly, we reverse this judgment of the court.

AFFIRMED, as to Golden Isles Case (No. 77-3467).

REVERSED, as to Florida Nursing Home Case (No. 78-2745).

APPENDIX II

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 78-2745, 77-3467

FLORIDA NURSING HOME ASSOCIATION, et al.,
Plaintiff-Appellants,

v.

WILLIAM PAGE, JR., et al.,
Defendants-Appellees.

GOLDEN ISLES CONVALESCENT CENTER, INC., et al.,

Plaintiffs-Appellants,

v.

PATRICIA ROBERTS HARRIS, etc., et al.,
Defendants-Appellees.

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC
(Opinion May 16, 1980, 5 Cir., 1980,
_____F.2d _____)

(July 22, 1980)

Before AINSWORTH and HENDERSON, Circuit Judges, and HUNTER, District Judge.

PER CURIAM:

The Petition for Rehearing of defendant-appellee Florida Department of Health and Rehabilitative Services is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) its Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Robert A. Ainsworth, Jr.
United States Circuit Judge.

APPENDIX III

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

NO: 76-1810-CIV-WMH
77-559-CIV-WMH

GOLDEN ISLES CONVALESCENT CENTER, INC., et al.,	:
Plaintiff,	:
vs.	:
JOSEPH A. CALIFANO, JR., etc., et al.,	:
Defendants.	:

FLORIDA NURSING HOME ASSOC., et al.,	:
Plaintiff,	:
vs.	:
WILLIAM J. PAGE, JR., et al.,	:
Defendants.	:

THIS CAUSE having come on to be heard upon pending motions and for status conference, it is

ORDERED AND AJUDGED that this cause and the case of Florida Nursing Home v.

Page, #77-559-CIV-WMH, be consolidated for trial insofar as the issues as to "reasonable cost related basis" are concerned.

* * *

As to the plaintiffs' petition, ore tenus, to review the Court's order on the retroactivity recovery claims, the Court being advised of an ambiguity in this Court's order denying the retroactive relief dated February 13, 1978 in the Golden Isles case, #76-1810-CIV-WMH, now consolidated for trial with the Florida Nursing Home, as stated above, and having considered additional argument on the question of retroactive relief, it is

ORDERED AND ADJUDGED that judgment be and it is hereby entered in favor of the state defendants and against the plaintiffs' entitlement to retroactive benefits prior to October 18, 1977, on

the basis that such claims are barred by the 11th Amendment. See Edelman v. Jordan, 415 U.S. 651 (1974).

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 7th day of July, 1978.

/s/ William M. Hoeveler
U.S. DISTRICT JUDGE

APPENDIX IV

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

NO. 76-1810-Civ-WMH

GOLDEN ISLES CONVALESCENT CENTER, INC., d/b/a HALLANDALE REHABILITATION CENTER, et al.,

Plaintiffs,

vs.

JOSEPH A. CALIFANO, JR., individually, and as Secretary of Health, Education and Welfare, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING PARTIAL SUMMARY JUDGMENT

October 18, 1977

Before HOEVELER, United States District Judge

HOEVELER, District Judge:

Certain nursing home operations located

in this District have brought suit against the State Department of Health and Rehabilitative Services, the Federal Department of Health, Education and Welfare, and their respective executive officers to require implementation of Public Law 92-603, Sec. 249, 42 U.S.C. Sec. 1396a(13)(E), hereinafter Sec. 249).

Jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1331. Venue, though objected to by the State defendants, lies in this district.

At the present time, the plaintiffs' Motion for Summary Judgment is before this Court. As will be set out more fully in this opinion, the Court is unable to adjudicate the whole case upon the present state of the pleadings and will therefore treat Plaintiffs' Motion as one brought under Rule 56(d), Federal Rules of Civil Procedure.

Plaintiffs are providers of skilled nursing facility services to the State of Florida which participates in the Medicaid Program with the Federal Government. Under the program, payments are made by the designated State agency to qualified beneficiaries, including Plaintiffs. These payments come from State and Federal sources and are made in accordance with regulations approved by the Secretary of Health, Education and Welfare.

This dispute centers around the regulations issued by HEW (45 C.F.R. Sec. 250.30 (a)(3)(iv)) requiring the State participants to provide reimbursements "on a reasonable cost related basis" to skilled nursing home facilities. The regulation sets an effective date of January 1, 1978. However, Section 249 sets an effective date of July 1, 1976. HEW contends that it was slow in

promulgating regulations and that it did not wish to penalize State participants for its own delay.

Since this case was commenced, the opinion of Judge Frank M. Johnson, Jr., in Alabama Nursing Home Association v. Califano, 433 F. Supp. 1325 (M.D. Ala. 1977) has been filed. Many of the same arguments brought before this Court by plaintiffs and defendants were addressed by Judge Johnson in some detail.

This Court is in substantial agreement with Judge Johnson that the portion of 45 C.F.R. Sec. 250.30(a)(3)(iv) setting an effective date of January 1, 1978, for implementation of Section 249 is inconsistent with the Congressional mandate. Therefore, the regulation is invalid insofar as it sets an effective date other than July 1, 1976.

The State of Florida has a present ability to calculate nursing home reimbursement rates on a cost related basis within the

meaning of Section 249. The deposition of Hugo Jordan, Reimbursement Supervisor, Nursing Home Program, State Department, Florida Department of HRS establishes that the State has the necessary data to promulgate a plan conforming to Section 249 on cost related basis effective immediately. There is some dispute as to whether or not the present plan conforms to Section 249, but the mandate of Congress clearly calls on the Secretary of HEW to make this determination administratively.

Accordingly, the Department of HEW is hereby directed to determine whether the plan of the State of Florida is in present conformity with the requirements of Section 249. The Department must determine whether the current Florida plan provides for reimbursement on a reasonable cost related basis to skilled nursing care providers.

The Department is directed to advise this Court of its determination within ten (10) days of the date of this Order. If the present plan (as is strongly urged by Plaintiffs) is not conforming, in the opinion of the Secretary, the State defendants are directed to submit a plan for approval to the Secretary no later than thirty (30) days from the date of this Order. Additionally, any plan submitted to the Department of HEW for approval by the State must make provision for the reimbursement to plaintiffs on a reasonable cost related basis for services rendered from the date of this Order prospectively. The Department of HEW is prohibited and enjoined from approving any State plan not providing for the reimbursement of these plaintiffs on a reasonable cost related basis as of the date of this Order.

The question of plaintiffs' entitlement to retroactive relief will be reserved at this time. Plaintiffs are directed to submit memoranda on this point no later than November 4, 1977. Defendants shall submit opposing memoranda by November 18, 1977. No further memoranda in response shall be allowed except upon leave of Court.

DONE AND ORDERED this 18th day of October, 1977, at Miami, Florida.

/s/ William M. Hoeveler
UNITED STATES DISTRICT JUDGE

APPENDIX V

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

FLORIDA NURSING HOME ASSOCIATION, et al.,

v.

WILLIAM J. PAGE, JR., Individually and as Secretary of the DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES OF THE STATE OF FLORIDA, et al.

CASE NO. 77-559-CIV-WMH

GOLDEN ISLES CONVALESCENT CENTER, INC., et al.,

v.

JOSEPH A. CALIFANO, JR., et al.

CASE NO. 76-1810-CIV-WMH

ORDER

AND NOW, this 16th day of September, 1978, upon consideration of plaintiffs, Florida Nursing Home Association, et al.'s Motion to Compel Defendants, William J. Page, Jr., Secretary of Department of Health and Rehabilitative

Services, to Reimburse the Plaintiff Nursing Home Pursuant to the Current Approved Title XIX State Plan Retroactive to October 18, 1977 Forthwith and Thereafter to Make Final Settlement Pursuant to a Title XIX State Plan That is in Compliance with the Social Security Law, it is hereby

ORDERED AND DECREED that the State of Florida, Department of Health and Rehabilitative Services shall:

(1) By using the methods of reimbursement under the currently approved plan, recompute the amount of reimbursement due plaintiff nursing homes for services performed pursuant to the State of Florida, Title XIX, Medicaid plan retroactive to October 1, 1977.

(2) Within thirty (30) days of the date hereof issue to each Home full payment of any amounts determined to

be the difference between what each Home did receive and what each Home would have received under the currently approved plan.

(3) Continue to reimburse the plaintiff nursing homes for Title XIX, Medicaid services performed at rates of reimbursement not less than those established under the currently approved plan with further voluntary increased rates of reimbursement of further order of the Court.

(4) That the matter be placed on the Fall 1978 trial list so that a full hearing will be held to determine whether the current State of Florida, Title XIX, Medicaid plan reimburses plaintiff nursing homes on a reasonable cost-related basis as required by 42 U.S.C. Sec. 1396a (a)(13)(E).

BY THE COURT:

/s/ William M. Hoeveler
U.S.D.J.

APPENDIX VI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FLORIDA NURSING HOME ASSOCIATION, et al.,

Plaintiffs,

v.

WILLIAM J. PAGE, JR. et al.,

Defendants.

No. 77-559-Civ-WMH

GOLDEN ISLES CONVALESCENT CENTER, INC., et al.,

Plaintiffs,

v.

JOSEPH A. CALIFANO, JR., et al.,

Defendants.

No. 76-1810-Civ-WMH

ORDER

THIS CAUSE is before the Court for status conference and review in light of the decision of the Court of Appeals for the Fifth Circuit in Alabama Nursing

Home Ass'n. v. Harris, 617 F.2d 388 (5th Cir. 1980). Having heard the arguments of counsel and being otherwise duly advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1. The trial of this cause and all pending discovery matters are hereby stayed until further order of this Court.

* * *

4. The Florida Long Term Care Reimbursement Plan is hereby referred to the Department of Health and Human Services (HHS) for compliance with its regulatory duties as set forth in the Alabama decision, supra.

a. This Court retains jurisdiction of this cause to ensure that the federal Defendants comply with this order and with the decision of the Court of Appeals.

b. This order is without prejudice to Plaintiffs' right to challenge the payment rates on remand should the Department, in the proper exercise of its agency duties, determine that the Florida Plan meets federal standards.

c. HHS shall have one hundred thirty-five (135) days from the date of this order within which to fully comply with this order and with the decision of the Fifth Circuit. Extensions will be considered only upon a showing of extreme hardship and unforeseeable change in circumstances, as the time now allotted, in addition to that which has already elapsed since the decision, is more than sufficient.

5. Both State and federal Defendants shall file with the Court status reports indicating the progress being made toward compliance with this order.

The first status reports shall be filed thirty (30) days from the date of this order, and thereafter reports shall be filed at 30-day intervals until completion of the actions required by this order.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 28th day of July, 1980.

/s/ William M. Hoeveler
UNITED STATES DISTRICT JUDGE